RECENT AMERICAN DECISIONS.

In the District Court of the United States for the District of Wisconsin.

ALFRED W. DAVIDSON AND OTHERS *vs.* JOHN S. SMITH.

1. State insolvent laws have no force beyond the limits of the State, except such as may be given them by comity. But where a contract was made between parties resident in a State, in the shape of a promissory note, on which a judgment was obtained in the same State by the endorsees against the maker, which judgment was sued on in the United States Court for another State by the same plaintiffs, who are citizens of the last-mentioned State, and a judgment was rendered thereon, and afterwards the defendant was discharged, under the insolvent laws of the State of the contract, the discharge may be pleaded in bar of an action upon the last judgment.

The opinion of the Court was delivered by

MILLER, J.—This action is founded on a record of a judgment rendered in the Circuit Court of the United States for the Northern District of the State of Illinois, at July term, 1855, against the defendant, as a citizen of the State of Wisconsin, and in favor of the plaintiffs as citizens of Illinois. That suit was upon a record of a judgment in favor of the plaintiffs against the defendant, rendered in September, 1854, in the Supreme Court of the State of New York for the county of Chautauque.

The defendant pleads in bar, that the judgment of the Court of the State of New York was founded on his promissory note, made to one Oliver Patch, or order, in the State of New York, and payable in the city of New York, and that Patch endorsed the note to the plaintiffs. That at the time of making the note and of the rendition of the first judgment, he (the defendant) and Patch were inhabitants and residents of the State of New York. That in the month of March, 1857, the defendant presented his petition to the county court of the county of Wyoming, in the State of New York, for his discharge as an insolvent debtor, in pursuance of the statute law of that State; and that he was thereupon discharged, and he made an *assignment by record* of the Court, in the month of May following. In his schedules, he returned these plaintiffs as

creditors living in the city of Chicago, State of Illinois, by a judgment rendered in the Circuit Court of the United States for the Northern District of Illinois, on a judgment rendered in the Court of Chautauque county, in the State of New York, upon his note to Oliver Patch, of New York, and payable in that State. And as the judgment in the declaration mentioned was rendered prior to the discharge, the defendant prays judgment if the plaintiffs ought further to maintain this action. To the plea, the plaintiffs demurred, in which the defendant joined.

The original debt was contracted by a promissory note, between parties in the State of New York, and payable in that State. The endorsees of the note recovered a judgment against the maker, in a Court of that State; and in a suit on that judgment record, they, as citizens of the State of Illinois, recovered a judgment in the Circuit Court of the United States, in Illinois, against the defendant, who was afterwards discharged, and made an assignment as an insolvent debtor, as a resident of the State of New York, under a law of that State, returning, in the schedule, the plaintiffs as residents of the State of Illinois.

In the absence of uniform laws on the subject of bankruptcies, throughout the United States, under the Constitution, the effect to be given discharges, under insolvent laws of the States, is a question of embarrassment to the courts and of interest to parties. The courts of the several States uniformly carry out their own laws, and between some of the States a comity is observed. For these reasons, decisions of the courts of the States, in regard to their own laws, or in observance of an existing comity, afford but little aid in the determination of the question presented by the pleadings. Decisions of the courts of the United States must be my guide, if I can ascertain them with sufficient certainty. The subject under consideration appropriately belongs to those courts, as it relates to the rights of citizens of different States.

It is understood that, by the insolvent laws of the State of New York, a debt is discharged where the contract was made within the State; or where the contract was to be performed within the State; or where the creditor, at the time of the first publication of notice,

was a resident of the State. Under that law, the Supreme Court of the State held, that the discharge of a defendant from the payment of his debts is an absolute bar to a recovery upon a contract, made and to be executed within the State; although the creditor be a non-resident of the State, and neither united in the application for the discharge nor accepted a dividend of the assets. And if such discharge be granted, after a judgment on the contract, the debtor will be relieved on motion, and a perpetual stay of proceeding on the judgment will be granted, the plaintiff being at the time a resident of another State. *Parkison* vs. *Scoville*, 19 Wendell, 150. That decision literally carried out the statute law of the State. There is no question but if the note had been held by the payee, or if these plaintiffs had resided in the State of New York, at the date of the discharge, and had not previously obtained a judgment, in the Circuit Court of the United States in Illinois, the defendant would be released from the debt. The release of the debt by the insolvent discharge is the only matter for consideration; the question of lien of either of the judgment is not in the case. The plaintiffs sue upon the judgment record simply as an evidence of debt.

In the case of *Burt* vs. *Smith*, (this defendant,) which was a suit upon a judgment record from a court of this State, which was founded on a judgment record from the State of New York, the Court adjudged the discharge binding on the plaintiff, as he was, at the date of the discharge, a resident of the State of New York, and as a creditor had joined in the petition to the Court for the discharge. In *Clay* vs. *Smith*, 3 Peters 411, the plaintiff, a non-resident of the State where the discharge was ordered, having received from the assignee a dividend of the assets, it was held that he was thereby concluded.

In *Ogden* vs. *Saunders*, 12 Wheaton, 213, it is decided that an insolvent law of a State, which discharges a party from his debts subsequently contracted, does not impair the obligation of future contracts between its citizens; but it cannot affect the rights of creditors, who are citizens of other States. The question in that case, as determined by the Court, was, whether a discharge of a debtor, under a State law, was valid against a creditor, a citizen of

another State, who had never voluntarily subjected himself to the State laws otherwise than by the origin of the contract. The debt had been contracted in the State of New York, where Ogden was discharged, the plaintiff residing in the State of Kentucky. Since the decision of that case, the constitutionality of State insolvent laws as to future debts has not been questioned in the Supreme Court of the United States; and the principle there decided, as to non-resident creditors, has been steadily maintained. In *Boyle* vs. *Zacharie*, 6 Peters 635, the debt was a contract of the State of Louisiana, and Zacharie, the creditor, resided in that State; Boyle, the debtor, resided in the State of Maryland, and was discharged under the insolvent laws of that State. It was held that the discharge in the State of Maryland did not affect this creditor. In *Clark's Executors* vs. *Van Reimsdyke*, 9 Cranch, 153, it is decided that a discharge, under the law of Rhode Island, will not protect a debtor against a debt contracted in a foreign country. And in *Cook* vs. *Maffit*, 5 Howard, 295, the Supreme Court adhere to their previous decisions, and decide that a contract made or to be performed in the State of New York, with a resident of that State, is not affected by a discharge of the debtor in the State of Maryland, where the debtor resided. That case was decided in the Circuit Court of the United States for the district of Maryland, the State in which the insolvent discharge was made, and the judgment was affirmed in the Supreme Court. Taney, C. J., in his opinion, says, that he ruled the case in the Circuit Court, in obedience to the decisions of the Supreme Court; and he remarks: "I cannot see how such laws can be regarded as a violation of the Constitution of the United States. For bankrupt laws, in the nature of things, can have no force or operation beyond the limits of the State or nation by which they were passed, except by the comity of other States or nations. According to established principles of jurisprudence, such laws have always been held valid and binding within the territorial limits of the State by which they are passed, although they may act upon contracts made in another country, or upon the citizens of another nation. And they have never been considered, on this account, an infringement of the rights of other nations, or their citizens.

"But, beyond the limits of the State, they have no force, except such as may be given them by comity. If, therefore, a State may pass a bankrupt law, in the fair and ordinary exercise of such a power, it would seem to follow that it would be valid and binding, not only upon the courts of the State but, also, upon the courts of the United States, when sitting in the State and administering justice according to its laws, and that, in the tribunals of other States, it should receive the respect and comity which the established usages of civilized nations extend to the bankrupt laws of each other."

From these remarks, it is apparent that the Chief Justice, in the Circuit Court for Maryland, would have considered the insolvent discharge in that State effectual against the non-resident creditor, if he had not been bound by the adjudications of the Supreme Court of the United States. In that case Mr. Justice Daniel and Mr. Justice Woodbury held, that the bankrupt law of a State is a law of the contract and enters into it, and that the *lex loci contractus* must govern. The position of Justice Woodbury is, "That such laws are to be regarded as if part of the contract incorporated into it, being construed according to the *lex loci contractus*, should be discharged by a certificate of bankruptcy given to the obligor in the State where the contract was made and was to be performed; and this, whether the action on it was brought in that State or another, or in the courts of the United States; and whether the obligor resides in that State or elsewhere, is considered as a part of the contract itself, it is inseparable from it, and follows it into all hands and all places." Justice Story, in *Le Roy* vs. *Crowinshield*, 2 Mason, 175, and in Story's Conflict of Laws, sec. 351, seems to favor this position. If this position were tenable, I should not have much difficulty in disposing of the question under consideration, but I am not disposed to adopt it as a controlling principle. These several positions of Chief Justice Taney and Justices Daniel and Woodbury are merely cited as modern principles, in regard to discharges under State insolvent laws. And in the reports of the Supreme Court of the United States, it will appear that the Justices, from time to time, varied in their opinions of those laws, from considering them as laws impairing the obligation of a contract in the sense of the Constitution

of the United States, to the extreme positions above cited. But, however they may have differed in their opinions, the law of the Court is, that an action of a non-resident plaintiff is not barred by a plea of discharge under a State insolvent law, unless he has abandoned his ex-territorial immunity, by voluntarily subjecting himself to the State laws, otherwise than by the origin of the contract. The question now to be considered is, whether these plaintiffs abandoned this immunity by obtaining the judgments against the defendant in the State of New York?

A judgment is the sentence of the law, pronounced by a court, upon the matter contained in the record. It is a debt of record; and, in many respects, is distinguished from a contract. The omission of a joint debtor, in a suit on contract, must be taken advantage of by a plea in abatement; but in a suit on a judgment record, such omission may be demurred to; *Gilman* vs. *Rives*, 10 Peters, 298. A suit on a judgment record is considered in the nature of a *scire facias* to revive a judgment. A judgment record is not evidence of a new contract, but is a debt of record founded on the original contract. At common law a judgment in a personal action could only be revived by a suit, until the *scire facias* was allowed by the statute of Westminster, 2 chap. 45. Debt lies on a judgment record, upon the principle of a contract implied in law. *Nul tiel record* is the only plea of the general issue; but payment, or release, in fact or law, may be specially pleaded, the same as to a *scire facias*. The action of debt on a foreign judgment is an original and independent action; but the defense is the same as to a suit on a domestic judgment, or to a *scire facias* to revive a judgment.

The judgment in the Circuit Court of the United States for the Northern District of Illinois was no satisfaction of the judgment in the county of Chautauque, in the State of New York. *Mumford* vs. *Stocker*, 1 Cowen, 178. But satisfaction of the judgment in New York would authorize the Circuit Court in Illinois either to order a satisfaction of their judgment, or to order a stay of further proceedings. If either order were made and certified here, there could be no further proceedings in this Court. If the defendant had paid the debt, interest, and costs of the judgment in New York,

on proof of such payment, he would be entitled to have satisfaction of the judgment in Illinois entered upon the payment of costs.

Upon the principle of the Constitution of the United States, and acts of Congress, that full faith and credit shall be given in each State to the judicial proceedings of every other State, an action on the New York judgment could not be maintained against a plea of discharge under the insolvent laws of that State. Judgments when sued on in another State are to be considered of the same force and validity as in the State wherein they were originally rendered.

The plaintiffs voluntarily subjected themselves to the jurisdiction of the State of New York. Their judgment was subject to the judicial authority of that State; and they, in regard to their judgment as an evidence debt, were bound by the subsequent action of the courts of the State, whether they resided in the State or not. And from the practice and proceedings of the courts of that State, after the discharge of the defendant as an insolvent debtor, it was competent to the Court of Chautauque county, upon motion, to order that no further proceedings be had on the judgment. Whether that order has been made or not does not appear, but we consider it as made. The Supreme Court of Pennsylvania, in the *Merchants' Insurance Company* vs. *De Wolf*, 9 Casey, 45, decided that a suit would lie on a record of a judgment in the State of New York that had been appealed from, but not superseded; leaving the judgment to be set aside or stayed by *audita querela* or a writ of error *coram nobis*, on a certificate of reversal of the original judgment. The reversal of that judgment was uncertain, and the Court proceeded, until the fact of reversal should be certified. In this case the extinguishment of the original judgment as a debt of record is reduced to a certainty.

Chief Justice Nelson, in the case of *Van Hook* vs. *Whitlach*, 26 Wendall, 43, remarks, on page 54: "I am not aware that it has been distinctly determined by any case in the Supreme Court of the United States that the discharge would not have been a bar against a citizen of another State, where the suit is brought in the Court of the State in which it was granted, and upon a contract made therein posterior to the law." Neither am I aware of any such decision in

the Supreme Court of the United States. But we now see that the Court of the State of New York has so decided; and, as the plaintiffs would be barred of a suit in that State, this Court has no right to question the position of the Court of that State, that the judgment in the county of Chautauque, into which the note merged, is extinguished as evidence of a subsisting debt. I think the plaintiffs are as much bound by the insolvent discharge of the defendant in the State of New York, as if they had consented to the discharge, and had received a dividend of the assets of the insolvent estate.

The judgment of the Circuit Court in Illinois was founded upon and, as I have shown, is dependant upon the satisfaction or extinguishment of the judgment in New York. That judgment being rendered before the insolvent discharge of the defendant, cannot be interposed to deprive the defendant of the legal benefit of his discharge. Such being the legal consequence of that discharge, in regard to the judgments in New York and Illinois, it follows that the plaintiffs cannot maintain this suit, and that the demurrer must be overruled, and judgment entered for the defendant.

In the District Court of the United States for Maine. September, 1858.

THE JOHN L. DIMMICK.—SKOLFIELD, CLAIMANT.

1. To entitle seamen to double wages, under the act of Congress, July, 1790, ch. 29th, sect. 9, on account of being put on short allowance of provisions, both the conditions mentioned in the act must concur, the vessel must have *left her last port* with a less amount of provisions than is required by the act, and the crew *must have actually been put on short allowance during the voyage.*
2. The statute is in its nature a penal law, and is not to be enlarged by construction beyond the natural and obvious meaning of its terms.
3. To bring a case within the statute, the short allowance must be during the passage of the vessel, and before she arrived at her port of destination.
4. When the crew is put on short allowance without necessity, in a case not within the act of Congress, there is a wrong in breach of contract, and a remedy will be given by a court of admiralty, in the form of additional wages.
5. It is a well-understood term of contract, that the crew, during the period of their service, shall be furnished with provisions by the owners, sufficient in amount and

of a suitable quality; and to refuse such a supply, without necessity, is as much a breach of the contract as to refuse payment of their wages, though this obligation is not expressed in the written or printed contract.

6. When the ship was lying in the bay of Mobile four months, waiting for cargo, and the usual supply of provisions from the ship's store were withheld, the crew being required to furnish themselves, by taking oysters from the oyster-beds, when the state of the weather permitted it to be done, and the supply being insufficient in quantity, they were held to be entitled to two months' additional wages.
7. The daily allowance to seamen, in the merchant service, ought to be equivalent to the navy ration.
8. The general rule of the maritime law is that the ship is liable, in specie, for all the obligations of the master, whether arising *ex contractu* or *ex delicto*, resulting from acts done in the exercise and within the proper scope of his authority as master.

Gen. Fessenden and *D. W. Fessenden* for the libellant.
Shepley & Dana for the claimant.

The opinion of the Court was delivered by

WARE, District Judge.—This is a libel *in rem.*, claiming extra wages, on the ground of an alleged short allowance of provisions. The libellant shipped on board of the John L. Dimmick, on the sixth of November, 1857, for a voyage from Portland to Mobile, thence to one or more ports in Europe, and thence back to her port of discharge in the United States, for wages at the rate of $18 per month. The ship arrived at Mobile on the 28th of November, and lay there, before proceeding to Havre, till the 7th of May, 1858, about six months. The first week after her arrival, the crew were employed in discharging her outward cargo, and in other work on the vessel; and up to this time we have no complaint of the provisions. After these services were performed, the ship remained lying at anchor in the bay, about fifteen or twenty miles from the city, waiting for freight, until the last days of March, or the first of April, a period of about four months. They were then informed that they would not further have served to them their usual allowance of food from the ship's stores, but they were to live on oysters; and these were to be procured, as it subsequently appeared, by themselves. It seems that these shell-fish are found in great abundance in that bay, and of a superior quality, and are taken with great facility. It is

stated by some of the witnesses, that it is not unusual for vessels lying there to be supplied with oysters, in part, at least, instead of ordinary ship fare. From this time, for about four months, and till they began to take in cargo, according to all the libellant's witnesses, their principal food was oysters, with the usual allowance of bread, and a small quantity of flour and potatoes and turnips to cook with them. The crew went themselves, in the ship's boats, to the oyster banks to procure them, and brought them on board to the amount of sixteen or twenty barrels at a time. From this time to about the first of April, when they began to take in cargo, oysters were the staple article of their food, and nearly, if not entirely, the only article of animal food, except when the state of the weather prevented them from obtaining a supply. Then they had the usual ship fare of salted meat served out to them; once, and only once, during the four months, their table was spread with fresh meat. This was at Christmas. For at least two-thirds of the time, if not more, their food, for morning, noon, and night, was oysters, boiled with a little flour and potatoes or turnips. Three or four times during the four months they had beans, and about as many, rice. Twice a week they had two small cakes baked for them, of soft bread, a specimen of which was brought into court, and one of them allowed for breakfast and one for dinner, instead of the allowance of ship bread. Most men, unless of a very quiescent temper, would have been dissatisfied with the sameness of this diet; but these men complained most of the insufficient quantity. They had not enough to satisfy the cravings of nature, and some of the witnesses say that not unfrequently they left the table as hungry as they went to it. When, for want of oysters, salt meat was allowed, it was, according to the testimony of the cook and the men, given with a sparing hand, not much exceeding half a pound a day. Twice the men went aft in a body, to complain to the captain. The first time they did not see him, though he was in the cabin. The second time they carried with them their breakfast of oysters, and asked him if he thought it enough. He said no; but if they did not open more, he would have them called at four o'clock, instead of from five to six, the usual hour of rising.

What constitutes a full or short allowance in the merchant service, is not fixed by the law. In the want of such a rule, the courts have thought that it ought to be equivalent to the navy ration. That is fixed at one pound of meat and fourteen ounces of hard bread, with one quarter of an ounce of tea, or one ounce of coffee or cocoa, and an addition of other farinaceous or vegetable food, as rice, peas or beans, or dried fruit. It is a liberal allowance for a hearty, hard-laboring man. If the witnesses of the libellant are to be believed, the allowance to this crew was far below the navy ration. The case of a short allowance is then clearly made out, unless this testimony is overcome by that offered by the claimant. Two witnesses were examined on this point, the mate and the steward. They appeared not unwilling to give a coloring to their testimony favorable to the owners. But when fairly examined, their testimony, I think, leaves the case about where it stands on that for the libellant. The credit of his witnesses is rather confirmed than impaired, and it may be added that they gave their testimony with a degree of coolness, deliberation, and apparent freedom from prejudice and passion, unusual in such cases. It ought, also, not to be forgotten, that during the whole of this four months of short allowance, there was no insubordination; the crew were uniformly obedient and submissive, with no appearance or pretence of even disrespectful language or behavior on their part, except in a single instance towards the mate, which is the subject of another suit now pending in court.

There is one part of the mate's testimony that calls for attention, as it serves, if true, to explain and extenuate any complaint of this exclusive diet on oysters. He says that before the crew were put on this diet they were consulted by him, the whole crew being present, and that they unanimously expressed a preference to have oysters rather than fresh meat. In this I think the mate must be mistaken, as all the other witnesses say, including the steward, that they never heard anything of the kind until they heard it from the mate in the court-room.

Upon these facts, the claimant has brought a libel claiming double wages, under the act of Congress, of July, 1790, chap. 29, sec. 9,

for the period of four months, while the crew were on short allowance. That act provides that every ship or vessel of 150 tons burthen, or more, bound on a voyage across the Atlantic, shall, on leaving *her last port*, have on board, under deck, 60 gallons of water, 100 pounds of salted flesh meat, and 100 pounds of ship bread, for each and every person on board, besides such other stores as may be put on board by the master or any passengers, and in a like proportion for a longer or shorter voyage, and in default of this supply, if the crew are put on short allowance *during the voyage*, the seamen shall be paid double wages for the period of such short allowance.

This act appears to me to bear on its face the character of a penal statute. It does not change the nature of the case that the penalty is given to the seamen. It is, therefore, like other penal laws, to receive a strict construction. The two facts of a deficient supply and an actual short allowance are connected in the act by a copulative and not disjunctive word. Both must, therefore, concur to constitute the *quasi* misdemeanor, which is visited with the penalty. *The Barque Child Harold*, Olcott Rep. 278; *The Mary*, Ware Rep. 459. The first inquiry then is, Was there a deficient supply on board when the ship sailed? The last port from which she sailed, before the short allowance, was Portland, and her port of destination, Mobile. Now, I think it is satisfactorily shown that the ship on sailing had as large a supply of provisions as the law requires for such a voyage. One of the facts, therefore, does not exist, which is necessary to make up the delinquency. It is true, as argued by the libellants' counsel, that if the provision is withheld from the crew, it is to them, for whose benefit the law was made, the same grievance as if the provisions were not there. Still, in the construction of a penal statute, where the law makes two acts necessary to complete the fault, it is a bold step for a court to say that it shall be completed by one.

But, if this were done, there is another difficulty behind, which appears to me to be not easily overcome. The short allowance, to bring the case within the statute, must be *during the voyage*. Now, when was the voyage ended? Within the meaning of this act of

Congress, it was, I think, on her arrival at Mobile. A voyage, in the most common and familiar acceptation of the word, is the transit from one place or port to another, and I think that the meaning intended by the law-makers of this law. The object of the Legislature in requiring a given amount of provision, proportionate to the ordinary duration of the passage, was to prevent that terrible calamity, a famine at sea. This is, at least, one of the most common meanings of the word, and is, I think, its meaning in this statute. The short allowance did not commence until one week after the arrival at Mobile, and not until the discharge of her outward cargo. My opinion, therefore is, that this libel cannot be maintained for the statute penalty. But does it follow that the seaman is without remedy for a great wrong? I think not.

This statute penalty does not, and was not intended to affect the mutual rights and obligations of the parties resulting from the nature of the contract. What are these within its fair meaning? The seaman engages to render faithfully all the services that pertain to the navigation of the ship, and all those that are naturally or by custom incident to that duty, as the making some slight reparations of the ship in caulking or painting the deck or other part of the vessel, which is occasionally required, and, also, in the loading and unloading the cargo, according to the custom of the trade in which she is engaged. But it has never, to my knowledge, been considered an incident to their general duty as mariners to occupy their time, while lying in port, in procuring provisions for the ship's use, either by fishing or otherwise. On the other hand the seamen stipulate for and the owners promise to pay the agreed wages. This stipulation and promise is embodied in the written contract. But there is always implied another stipulation and promise, though not put in writing, that provisions for the board of the crew shall be furnished by the master and owners, and that these shall be served out to them in sufficient amount and of suitable quality. This proviso is just as binding on the owners as the written promise to pay their wages. To withhold from them an adequate supply, or to furnish food that is unwholesome, or of an unsuitable quality, is just as much a fraud in the contract, as it would be to pay them their

wages in clipped coin or depreciated bank bills. I am unable to see the ground on which a distinction can be made between one and the other. If it be a manifest wrong and fraud on the contract, it would be a reproach to the law not to furnish a remedy. What difficulties might present themselves in the refined and subtle technicalities of the common law it is unnecessary here to inquire. The wrong is not beyond the remedies of a court, professing, like the admiralty, to decide, *ex æquo et bono*, on enlarged principles of natural equity and the universal justice.

The seamen's contract so obviously includes board that it may be deemed unnecessary to refer to authorities in support of this. But the old sea laws were curiously directory on this as well as on other subjects. *The Conselato del Maro*, chap. 145, obliges the master to give the seamen meat three times a week, that is, Sunday, Tuesday, and Thursday, and wine every morning and afternoon, and to double their rations on festival days. And if during the voyage he is in want of provisions or other necessaries, and if he is without money, the ship is bound; chap. 239. And it seems that they were purchased on the credit of the ship solely, for if that was lost the creditor lost his debt.

But this is a libel *in rem* against the vessel, and it is argued that even admitting there is a wrong for which the seamen is entitled to a remedy, that it is one for which neither the owners nor the ship is liable; that when the owners have put on board the vessel provisions to the amount and of the quality required, if the master unnecessarily puts the men on short allowance, this is his own personal delinquency, for which he alone is responsible. The general rule is that the owners are responsible for the acts of the master done in his character of master, and within the scope of his authority as such. *Omnia facta magistri debet prestare qui eum præposuit; Dig.* 14, *I*, 1, § 5; *ejus rei nomine cujus ibi præpositus fuerit Dig.* 14, *I*, § 7. This is the language of the Roman law, and the word *facta, acts*, include both the contract and faults or torts of the master committed in the transaction and management of the business within the legitimate range of his authority. For though faults, like crimes, are in their nature personal, and imputable only

to the delinquent individual, yet, says the jurisconsult, the exercitor of a ship and the institor of a shop or store is considered as in some measure culpable for employing an unsuitable man for his business. *Aliquatenus culpae reus est, quod opera malorum hominum uteretur, ideo quasi ex maleficio teneri videtur*, Dig. 44, *VII.* 5, § 6; Instit. IV. 5, § 3. The law of France precisely agrees with the Roman law. The 216 article of the Code de Commerce provides that the owners are civilly responsible for the acts of the captain in what relates to the ship or the voyage. *Tout proprietaire est civilement responsible des faits du capitaine pour ce qui est relatif au navire et a l'expedition.* And the commentators explain the word *faits*—acts—as a generic term, which includes *des fautes et des engagemens*, faults and contracts. *Emerigon Contrats á la Grosse*, chap. 4, sec. 2, *by Boulay Paty.* And this is in perfect conformity with the ancient and well-established maritime law of Europe. *The Consolato del Mare*, chap. 77, provides, that the captain shall be liable for any damage done to merchandise by bad storage, and adds, that "in all damages mentioned above, and in all those which shall be mentioned in the chapters of the sea, which the ship ought to pay, the captain is bound for his part, and each part owner for his part. The ship is liable, but has its remedy over against the person who is guilty of the fault.

The law of this country, as to the liability of owners for the acts of the master, as I understand it, is the same as the general maritime law of the world. And it stands on the general principles of the law of agency. The principal is always responsible to third persons for the acts of his agent, for his faults, his acts of misfaisance or nonfaisance, committed in the transactions of the business confided to him, as well as for his own contracts. *Story on Agency*, sec. 452.

It is, without question, entirely within the scope of the master's authority to direct and regulate the allowance of provisions for the crew. In doing this, he acts strictly within the limits of his powers. If he puts the crew on short allowance during the voyage, and the vessel was not, when she sailed, provided with the required amount of provisions, the act of Congress determines the nature and the ex-

tent of the indemnity to the crew. They shall be allowed and paid double wages, and the penalty may be recovered with the stipulated wages. The seamen have the same remedies for both against the masters, owners, and the ship. If he puts them on short allowance in a case that does not fall within the statute, as when the vessel has been supplied with the amount of provisions required, or when the vessel is not at sea on the voyage, but lying in port, or if he provides for them food of an unwholesame or unsuitable quality, and that without necessity, it seems to me to be not only an injury to the crew in the nature of a tort or nonfeasance, as it appears to have struck Judge Betts in the case of *The Barque Child Harold*, Olcott Rep. 278, but, also, a plain breach of the well-understood terms of the contract by the authorized agent of the owners, for which they are answerable on the ordinary principle of the law of agency. And as this was an economy practiced by the captain for the benefit of the ship and owners, and at the expense of the crew, it is most equitable that the ship's owners should pay for it. The crew had not only cause to complain of the insufficiency of their allowance, but for being restricted almost exclusively to a single article of animal food, and for part of the time, one or two weeks after the oysters had, from the heat of the weather, become unwholesome, and absolutely unfit for food at all.

I allow, under the circumstances of the case, to the libellant, two months additional wages, one-half the time the crew were on short allowance.

Decree $36 damages and costs.

In the Circuit Court of the United States for the Eastern District of Pennsylvania.[1]

UNITED STATES *vs.* JAMES W. HALL.

1. If a passenger in a railroad car or steamboat, passing over a post-road, carry letters, without the knowledge or consent of the proprietor of such car or boat, or any of his servants, the owner does not incur the penalty prescribed by the nineteenth section of the act of Congress of the 3d of March, 1825.

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[1] From the Public Ledger of 9th October, 1844. This is the case cited by Cadwalader, J., in United States *vs.* Kochersperger, *ante* 150.

2. If the owner of the car or steamboat be not liable under the nineteenth section of the act, no penalty is incurred by the person who sends such letters, under the twenty-fourth section.
3. But if a person be openly engaged in the business of private letter carrying over the post-roads of the United States, and a railroad company be notified by public advertisement, and by the agent of the post-office department, that the party and his agents are engaged in such business, they will be liable to the penalty prescribed by the nineteenth section, for conveying such agents carrying letters.
4. And the company being liable under this section, the person employing such agents in the transportation of letters over a post-road, becomes liable under the twenty-fourth section.

This was an action to recover a number of penalties for a violation of the twenty-fourth section of the act of Congress of the 3d of March, 1825. There was a special verdict, by agreement of the parties, which is fully stated in the opinion of the Court; and, on a motion to enter judgment upon the verdict in favor of the United States, the following opinion was delivered by

RANDALL, J.—This action is brought to recover the sum of two thousand dollars, alleged by the United States to have been forfeited by the defendant, for various breaches of the provisions of the act entitled "An act to reduce into one the several acts establishing and regulating the post-office department," approved March 3d, 1825, the nineteenth section of which enacts, "that no stage or other vehicle, which regularly performs trips on a post-road or on a road parallel to it, shall convey letters, nor shall any packet-boat or other vessel which regularly plies on a water declared to be a post-road, except such as relate to some part of the cargo: for the violation of this provision, the owner of the carriage or other vehicle or vessel shall incur the penalty of fifty dollars; and the person who has the charge of such carriage or vehicle, or vessel, may be prosecuted under this section, and the property in his charge may be levied on and sold in satisfaction of the penalty and costs of suit: *Provided*, That it shall be lawful for any one to send letters by special messenger." And by the twenty-fourth section, it is declared, "that every person who, from and after the passage of this act, shall procure and advise and assist in the doing or perpetration of any of the acts or crimes by this act forbidden, shall be subject to the same penalties and punishment as the persons are

subject to, who actually do or perpetrate any of the said acts or crimes, according to the provisions of this act." When the cause came on for trial, the parties agreed that the jury should find the following facts in the nature of a special verdict, viz:

"That the above-named defendant did, on the 5th day of July last, enter upon the business of conveying letters out of the mails of the United States of America, between the cities of Philadelphia and New York, for all persons who would pay him at the rate of six and a quarter cents for each single letter; and in pursuance thereof, did establish offices in the said cities of Philadelphia and New York, (as will appear by the printed advertisements annexed,) and that the said defendant has ever since, daily, for forty successive days, been employed by himself and his agents in conveying letters for hire out of the mails of the United States, in certain steamboats and railroad cars, between the said cities of Philadelphia and New York, and of delivering the same to the person or persons to whom said letters were directed, and that the letters aforesaid did not relate to any part of the cargo.

"That the steamboats and railroad cars aforesaid were owned by the Camden and Amboy Railroad and Transportation Company, and that the said steamboats plied regularly on a water, and the said railroad cars performed regular trips on a road, which said water and road were declared by acts of Congress to be a post-road of the said United States. The said defendant was not a member of said Company, nor did he own all or any part of said steamboats and railroad cars.

"While engaged in the conveyance of letters, as aforesaid, the said defendant and his agents paid the said Camden and Amboy Railroad and Transportation Company the usual fare paid by passengers over the road, for conveying him and them between the said cities of Philadelphia and New York.

"The said Camden and Amboy Railroad Company were not engaged in the business, and did not participate in the profits of conveying the letters aforesaid; but were notified by public advertisements of the said defendant, and by the agents of the post-office department of the United States, that the said defendant and

his agents were employed in the said business of conveying letters as aforesaid.

"And the jurors aforesaid do further find, that, at the time aforesaid, there was a contract under date of the — day of ———, between the Postmaster-General of the United States and the said Camden and Amboy Railroad and Transportation Company, for the transportation of the mails of the United States between the said cities of Philadelphia and New York, in the same steamboats and railroad cars which conveyed the letters of the defendant, as aforesaid. And the said jurors do further find and present, as part of their special verdict, certain acts of the Legislatures of Pennsylvania and New Jersey, relating to the said Camden and Amboy Railroad and Transportation Company, together with the charter of the same."

The District Attorney moved for judgment in favor of the United States on this verdict, which the counsel for the defendant resist and contend—first, that if the act of 1825 is so construed, as to give to Congress the *exclusive* power to establish and regulate post-roads, then it is unconstitutional and void; and if not so construed, then the defendant has committed no offence.

The eight section of the first article of the Constitution of the United States declares, among other things, that Congress shall have power to establish post-offices and post-roads, "and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." Without undertaking now to examine the cases in which the last branch of this section has received a construction in the courts of the United States, and admitting that the phraseology of the act of 1825 is to be construed, as contended for by the counsel of the United States, I do not feel such a "clear and strong incompatability" between the Constitution and the act of Congress so construed as will authorize me to declare the act void. *Fletcher* vs. *Peck*, 6 Cranch, 87. It is not upon slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its power; the presumption is always in favor of the validity of the law, if the contrary is not clearly demonstrated, 4 Dallas, 14. It will, therefore, be

necessary to consider the second ground of the defence, viz: that admitting the law to be constitutional, the facts found by the jury do not render the defendant liable to any of its penalties.

It is contended by the defendant, that this, being a penal law, is to be strictly construed, and that, unless the owners of the cars knew that the defendant was carrying letters in violation of the law, they were not liable to the penalty provided by the nineteenth section, and that if the owners were not liable under that section, then the defendant cannot be liable under the twenty-fourth. And the *United States* vs. *Kimball*, decided by the District Court of the United States for the District of Massachusetts, (7 Law Rep. 32,) and subsequently affirmed by Judge Story, in the Circuit Court of the First Circuit, has been relied on as sustaining their positions.

In the case of the *United States* vs. *Fisher*, tried before me in June last, the same case was relied on by the counsel for the defence, and a newspaper report of the affirmation of the judgment of the District Court was produced. In charging the jury, I expressed myself as not satisfied with the reasons given by the District Judge for the conclusion at which he had arrived, and expressed a doubt as to the correctness of the newspaper report of the decision of the Circuit Court; at the same time, I mentioned to the jury, that if the counsel for the defendant could afterwards show me that the distinguished Judge, presiding in the Circuit Court, had expressed a judicial opinion on the subject, I would cheerfully yield my opinion to his. The letter of Judge Story to the Postmaster-General of September 4th, 1844, shows that he adopted the opinion of Judge Sprague. The facts, as given in evidence in the case of Fisher, are similar, and within the principle decided in the case of Kimball. The same view of the law has since been taken by the learned Judge of the Northern District of New York, (Judge Conkling,) in the case of the *United States* vs. *Pomeroy & Co.* I, therefore, cheerfully yield my opinion to such authority, and will make the rule to show cause why a new trial should not be granted in Fisher's case absolute.

It remains to be considered how far the questions decided in the

case of Kimball are similar to those in the present. Judge Story, in his letter to the Postmaster-General, says, "I coincide in the opinion of Judge Sprague, and my own opinion was confined to the very question decided by him."

The questions decided by Judge Sprague, are:

1. That if a passenger in a railroad car or steamboat, passing over a post-road or route, carry a letter without the knowledge or consent of the owner of the car or steamboat, or any of his agents or servants, such owner is not liable to the penalty provided by the nineteenth section of the act of 1825.

2. That such knowledge or assent are not to be presumed from the facts admitted in the case: and,

3. That the person who sends such letter by such passenger is not liable to the penalty provided by the twenty-fourth section of said act, unless the owner of the car or steamboat is liable to the penalty provided by the nineteenth section.

The facts in that case, as reported in the opinion of Judge Sprague, were, that the defendant sent a letter from Boston to New York, by a person who went as a passenger in the car, and who received no compensation for carrying the letter; but the defendant had received compensation therefor, and his stamp, indicating the fact, was upon the letter. The person who carried the letter had no connection with the owners of the car or their agents, except as a passenger. The owners had previously advertised that they would not take passengers who would convey letters contrary to law, and enjoined all persons in their employment not to receive them; neither the owner nor their agents had any knowledge of the conveyance of said letters.

The facts found by the jury, in the present case, differ in many particulars from that. Instead of sending a single letter by a passenger, the defendant entered upon the business of conveying letters out of the mail, established offices for that purpose, and in pursuance of what, in his advertisements, he calls his "Independent Mail Arrangements," was, by himself and his agents, employed "for forty successive days" in carrying letters out of the mails of the United States.

That this was contrary to the spirit of the act of 1825, can hardly be contended. But it is said, that act being highly penal is to be strictly construed, and unless the defendant is also within the letter of the law, he may defy its spirit with impunity.

But notwithstanding this rule, the intention of the law-makers must govern in the construction of penal as well as other statutes; they are not to be construed so strictly as to defeat the obvious intention of the Legislature; the maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in the sense in which the Legislature has obviously used them, would comprehend. The intention of the Legislature is to be collected from the words they employ. Where there is no ambiguity in words, there is no room for construction. *United States* vs. *Wiltberger*, 5 Wheat. 76.

Nothing more is meant by the maxim that penal laws shall receive a strict construction, than that they shall not, by what may be thought their spirit or equity, be extended to offences, other than those which are specially described and provided for. A court is not, therefore, precluded from inquiring into the intention of the Legislature. However clearly a law may be expressed, this must ever, more or less, be a matter of inquiry. A court is not, however, permitted to arrive at this intention by mere conjecture, but is to collect it from the object which the Legislature had in view, and the expressions used, and which should be competent and proper to apprise the community at large of the rule, which it is intended to prescribe for the Government. 1 Paine, 334.

That the intention of the Legislature in passing the act of 1825, was to prevent competition with the Government on any of the mail routes, cannot be denied; some of the routes are profitable, and produce a revenue to the post-office department; but others are a burden, and exhaust this profit in their support. If the most profitable routes are to be occupied by private individuals or companies, the consequence must be, that the remote routes, although of equal importance to those interested in them, must be abandoned, or supported from the treasury of the United States; which is well known to be contrary to the general policy of the Government.

But, whatever be the consequence of such a construction, unless the offence of the defendant is within the obvious prohibition of the Legislature, he is not liable to the penalty.

The prohibition in the nineteenth section is against "any stage or other vehicle" carrying letters on a post-road; for the violation of this provision, the owner of the vehicle is made liable to a penalty of fifty dollars, which may be recovered in an action against the person having charge of the vehicle, who is not made personally liable; but a judgment against him authorizes a levy on and sale of the vehicle, although not belonging to him. It is said, however, that this judgment cannot be obtained, or the penalty enforced, unless the consent of the owner to the transmission of the letters was first obtained. That the prohibition implies an act, or that the vehicle is but an instrument, and being but an inanimate object, can give no consent nor commit no offence; yet, by the act, it is the *vehicle* or *carriage*, and not the *owner*, that is prohibited.

In the case of the *United States* vs. *The Schooner Little Charles*, 1 Brockenbrough, 348, the schooner was seized for a violation of the embargo laws, and the libel dismissed by the District Court. An appeal was entered to the Circuit Court, in delivering the opinion of which, Ch. J. Marshall observes: "This is not a proceeding against the owner; it is a proceeding against the vessel for an offence committed by the vessel, which is not less an offence, and does not less subject her to forfeiture, because it was committed without the authority and against the will of the owner. It is true, that inanimate matter can commit no offence. The mere wood, iron, and sails of the ship cannot of themselves violate the law. But this body is animated and put in action by the crew, who are guided by the master, &c.;" and the vessel was condemned and forfeited. See also 12 Wheaton, 14, 15.

It is further argued, that the owners of the cars were but common carriers, bound to take the passengers without the privilege of examining or detaining their baggage, that there was perfect innocence of intention on their part, and the infliction of a penalty, under such circumstances, would not be consonant to the general principles of jurisprudence or natural equity.

There are, however, many cases under the revenue laws, in which a party, with perfect innocence of intention, and without any idea that he is violating the law, becomes liable or subject to a penalty or forfeiture. This is clearly manifested by the act of 3d of March, 1797, which provides a mode for the remission of the fine or forfeiture, where it has been incurred, "without willful negligence or any intention of fraud, in the person or persons incurring the same." 1 Story, 458.

The nineteenth section of the act, which inflicts this penalty, says nothing about the guilt or innocence of the owners; it says that no stage or other vehicle shall convey letters; and for the violation of this, the owner is made liable for a penalty. In the case of the *United States* vs. *The Brig Malek Adhel*, 2 Howard, 210, which was an appeal from the Circuit Court for the District of Maryland, affirming the judgment of the District Court, which condemned the brig for certain alleged piratical acts, it was admitted that the owners never contemplated or authorized said acts, and the equipments of the vessel, when she left New York, and ever afterwards, were the usual equipments of a vessel of her class, on an innocent commercial voyage, such as that stated in the evidence. In delivering the opinion of the Court, Judge Story observes, (page 233,) "The next question is, whether the innocence of the owners can withdraw the ship from the penalty of confiscation, under the act of Congress. Here again, it may be remarked, that the act makes no exception whatsoever, whether the aggression be with or without the co-operation of the owners; the vessel which commits the aggression is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches, without any reference whatsoever to the character or conduct of the owner; and this is done from the necessity of the case, as the only adequate means of suppressing the wrong."

The same necessity, it appears to me, exists in the present case. Any other construction of the act would, in my opinion, go wholly to defeat its operation and violate its plain import. But the jury have here found that the railroad company were notified by public advertisements, and by the agents of the post-office department of

the United States, that the defendant and his agents were employed in the business of carrying letters. Such notice, certainly, would go far to remove any objection to making them liable to the penalty to which, in the cases cited, the owners were subjected, without notice or opportunity to avoid the prohibited act.

It is my opinion, from the facts found by the jury, that the defendant did *procure* and *assist* in the doing or perpetration of the acts prohibited by the nineteenth section of the act of 1825, and that by so doing has incurred the penalties claimed by the United States. I feel the less difficulty in coming to this conclusion, as the case has been submitted with a view (whatever may be the result here) of removing it for reconsideration to the Supreme Court of the United States, whose decision will hereafter insure a uniform course in all the courts of the Union, and where any error or injustice has been committed by this court it will be fully corrected.

Judgment is entered on the verdict in favor of the United States, for $2,000.

George M. Dallas and *Henry M. Watts* for the United States. *John Sergeant* and *O. F. Johnson* for the defendant.

In the Supreme Judicial Court of Massachusetts.

ATLANTIC BANK VS. MERCHANTS BANK.

1. A, a broker, drew a check on the Merchants Bank, where he had no funds, and by fraudulently conspiring with B, the Bank's paying teller, caused the check to be marked "good;" and thereupon A, the broker, took it to C, a teller in the Atlantic Bank, who cashed it, and the funds were then placed in the hands of B, in order to make B's account good while undergoing an examination by the Bank's officers: the purpose for which the money was to be used being known to all three of the parties, but unknown to the officers of either Bank, and it being intended to be returned the next day after the examination; but before the check was returned and a settlement made between the Banks, B's fraud was discovered, and he committed suicide: *it was held*, that the Atlantic Bank, whose money was taken without authority and without consideration, and by a fraud, and went directly into the funds of the Merchant's Bank by a conspiracy of the tellers, could maintain an action of assumpsit for money had and received.

2. The transfer of a sum of money from one party to another, in order to be a payment of a debt, must be so intended by both parties.

In this case, which was argued at November Term, 1857, and decided at March Term, 1858, the facts appear in the opinion of a majority of the Court, as drawn up by

SHAW, C. J.—The amount in controversy in the present case is sufficient to give it a character of importance, and the principles on which it is to be decided require careful consideration. It is an action brought by one regular incorporated city bank against another, to recover the sum of $50,000, which, it is alleged by the plaintiffs, has been fraudulently transferred from their own possession to that of the defendants, and the latter has no right in equity and good conscience to hold it against the plaintiffs. The action was commenced on the 3d of May, 1855, being *indebitatus assumpsit*, for the above-named sum and interest thereon. The answer denies that the defendants owe the amount, as alleged.

The case came on to be tried. At the close of the plaintiffs' evidence it was suggested by the Court, and assented to by both parties, that the whole evidence should be reported, and that the Court —drawing such inferences of fact as a jury would be warranted in drawing—should enter such judgment as the law requires, or order a new trial, if in the opinion of the Court such trial would be necessary to a more perfect understanding of the rights of the parties.

There is no great conflict of evidence now on any material point, and the case upon the evidence is substantially this:

Thomas W. Hooper, who was the paying teller of the Merchants Bank, was a defaulter to a large amount. He was the principal teller, and had the immediate charge and custody of the cash funds within the bank; and other officers, who were necessarily entrusted with cash, accounted with him daily. In theory, therefore, he had, and at all times ought to have, in his control cash—*i. e.* always, be it understood, specie or bank notes—to the amount which he would appear to be charged with, by the balance of the book-keeper's account. That balance, perhaps, could not be struck till the close of each day's business, because during business-hours each day the balance might be constantly shifting by the passing transactions.

It was the practice of the Directors to examine and count the teller's cash occasionally—ordinarily, as often as once a quarter. The purpose of this examination and count was to ascertain whether any

cash had been withdrawn: the teller having no occasion and no authority to pay or receive money outside of the bank; if there was a deficiency, it must be attributed to fraud or mistake, and it would afford one means of detecting either. On Monday, 26th of March, shortly before the close of bank hours, the President gave notice to Hooper, the teller, that he and a Committee of the Directors would attend that afternoon, to examine and count his cash. The object of giving this notice was, that he might be there with his keys, ready to produce the cash as called for. Short as the time was, it gave Hooper an opportunity to carry into effect a fraudulent scheme, by which he was to obtain a sum of money to place with his own whilst being counted, and thus fraudulently to conceal from the Directors a knowledge of his defalcation. A conspiracy had been deliberately entered into between Hooper, the defaulting teller of the Merchants Bank, Richard Ward, a teller of the Atlantic Bank, and Augustus S. Peabody, a broker, to this effect: that Peabody should draw a check on the Merchants Bank, where he had no funds, for $25,000; that Hooper should certify it to be "good;" that thereupon Peabody should take it to Ward, at the Atlantic Bank, receive $25,000 of the bills of the Atlantic or other cash funds, take them back and deliver them to Hooper, to be placed with his own cash funds, and be counted with them as his own: after they had been so used, Hooper was to deliver back the like amount, $25,000, to Peabody, to be delivered to Ward, and replaced with the funds of the Atlantic. In confirmation of this conspiracy, and that it was deliberate, the same thing had been actually practised on Thursday of the previous week, when Hooper had notice that his cash was to be counted; but the notice, for some reason, was not acted on, and the cash was not counted: the $25,000 taken from the Atlantic, in the manner before stated, was restored to it by Ward, its teller. The same thing was again done on the 26th of March, near the close of bank hours, after the notice to Hooper that his cash was then to be examined. Peabody drew the check, Hooper certified it "good;" Peabody carried it to Ward, of the Atlantic, and received from him $16,000 in bills of the Atlantic and $9,000 in bills of other banks, carried them to Hooper, passed them to him over the counter of the Merchants Bank, and they were placed by Hooper with the funds of that bank

of which he was the ordinary keeper, within the bank. Peabody and Ward both knew of the purpose for which Hooper wanted the money; and it was the understanding between all of them that the money was, the next morning, to be returned to Ward, and replaced with the funds of the Atlantic Bank, as had been done the week before when taken for a similar purpose. The delivering of the money from Ward to Peabody was without authority or knowledge of any other officer of the Atlantic.

Pursuant to the notice given by the President of the Merchants Bank to Hooper, the cash of that bank was counted on the afternoon of 26th of March by Haven, President, and Fay, one of the Directors. The above $25,000 was included, and counted with the teller's cash. The amount was found to be correct, and a certificate to that effect was made and entered in the minutes of the Directors. After it was thus counted, the whole amount was returned to Hooper, who put it into his trunks, locked them, and returned them to their several places in the bank.

During this examination the suspicions of the President were somewhat excited, by finding, as he thought, an unusual amount of the bills of the Grocers Bank and by finding two large packages of Atlantic bills, and he questioned Hooper about it; but he had no suspicion, at that time, of Hooper's honesty.

During the same afternoon, one of the Directors, Fay, stated to the President, that it was known outside the bank that the cash was to be counted that afternoon, and Hooper also was asked if he had said anything about counting the money; and he said he had not.

After Hooper had received back his cash and left, some conversation took place between Fay and the President, in which they expressed their confidence in the honesty of Hooper, but their surprise at the singular circumstance that it should be known out of the bank that the cash was to be then counted; and a proposal was then made and assented to, to have another examination as soon as convenient—suddenly; that is, without previous notice to the teller.

In consequence of these feelings, the President determined to speak with Hooper the next morning. He went to the bank earlier than usual, a little before the ordinary bank-hour for opening. Hooper was then just entering the bank. The President wished to

speak with him, and they went into the Directors' room, when a conversation followed, which is thus stated in the President's testimony:—"I said, 'Mr. Hooper, I asked you, yesterday, if you had told any one that the money was to be then counted;' and he said, No, I told you I had not.' I said, 'Such a communication as that disturbed me a little, and I felt that I would speak to you and ascertain if you had named it to any one.' I asked why it should have been alluded to outside of the bank. I told him I put great confidence in him, and should be satisfied with his answer, and wished, if there was any trouble in his private affairs, he would divulge it to me. He said, emphatically: 'The cash is right; you have examined it, and know that it is right; and I have nothing to divulge.'"

Some other conversation took place. Hooper thanked him for the confidence the Directors placed in him, and expressed a wish to go immediately to New York, where he had been intending soon to make a visit. Haven discouraged his going there, but told him, if he saw fit to go, to go and deliver his money to Simpson, the receiving-teller; not expecting, however, that he was to leave before the close of business that day. Haven did not displace him, and entertained no suspicion of his integrity. He did not understand that Hooper proposed to leave the bank to go to New York, till the close of that day. Haven did not go into the banking-room till half an hour after, and then saw the cashier in Hooper's place. After the counting, the President and Committee would not have handed back the cash to Hooper, if there had been a deficit: it was handed back to him and left in his entire control, in the usual way, without any one to watch him.

It appears that Hooper did not take his place in the bank-room that morning; and, before half-past 10 A. M., had committed suicide.

It further appears, that on the 27th, after the death of Hooper, by suicide, had become known, Peabody and, afterward, Ward went into the Merchants Bank, and fully disclosed to Haven and other Directors the facts and circumstances under which the said check for $25,000 had been drawn by Peabody, and certified "good" by Hooper. Haven said to him, that Hooper had no right to certify such check, and the bank would not pay it.

In the morning of that day, according to the usual practice of Boston banks, Ward, the teller of the Atlantic, received from the Merchants Bank, by the messenger, the $16,000 of their own bills, and the $9,000 of other banks, and Ward, in his official capacity, gave the Merchants Bank credit for that amount, together with some few other bills. This was before the death of Hooper. The check was not then sent. But, subsequently, the check was sent with other funds, after the death of Hooper was known; but, before 12 o'clock, the other funds were received by the Merchants' and credited, but the check was refused payment, and subsequently, the same day, protested by a Notary Public for non-payment.

Perhaps it may not be necessary to state the facts more particularly; some others may be referred to hereafter.

In the first place, it is obvious that this sum of $25,000 in cash—bank notes, used and treated for most purposes as cash, in the same manner with specie—was transferred from the plaintiff bank to the defendant bank by means of a gross fraud and conspiracy, deliberately formed, carried into effect by three persons, with steady purpose and performance, attended with as much criminality and turpitude as can well characterize any transaction, where rights of property only are violated. Hooper, the paying teller, entrusted with the actual custody of the whole cash of the Merchants Bank, was under an old defalcation, which he designed fraudulently to conceal. Peabody, a broker, and Ward, a confidential officer of the Atlantic Bank, entered into a fraudulent conspiracy with Hooper, with a full knowledge of his criminal purpose, to enable him to conceal this defalcation from his employers—first, by abstracting the funds of the Atlantic by an embezzlement amounting to larceny, and, subsequently, to defraud the Merchants, by a similar embezzlement to be practiced by Hooper. It is immaterial to any question here, who of these parties was first to propose the scheme, or what motive personally actuated them respectively; they each knew of the criminal purpose, and each contributed in his own measure to accomplish it. It was a criminal conspiracy to do an unlawful act by an unlawful means. The first act was that of Hooper, in endorsing Peabody's check.

The next consideration is, that by means of this fraud the money

was taken from the Atlantic without its authority, and for which it received no consideration, and went directly into the cash funds of the Merchants Bank, for which it paid no consideration, unless it was to be deemed a lawful payment of Hooper's defalcation, which we shall consider afterwards.

It was the property of the plaintiffs when it left their bank. The guilty agents, including Hooper, with full knowledge of the fraud, could acquire no title to it against the plaintiffs. Hooper could, therefore, give no title to the bank, as of right; nor could the bank hold the bills as negotiable securities, transferable by delivery, taken for a good consideration and in the ordinary course of business, nor as money, without some consideration paid. It appears, therefore, to be the ordinary case, where one party has received money, the property of another, which rightfully, equitably, and in good conscience he cannot hold, and therefore the action of assumpsit for money had and received will lie for it.

It may be proper to consider whether money, had and received, is the proper remedy, or whether the action should have been in tort for the conversion of the bank bills. It appears that $16,000 of the $25,000 taken from the Atlantic Bank, were its own bills. Had these been new bills, never issued by the bank, one scruple might arise, whether the bank, without having delivered them, would be bound as contractors. It is said that on this ground the Bank of England never issue a bill the second time, but take it up and cancel it. But here it is the universal custom of all banks to issue the same bills *toties quoties*, so that when a bank bill, duly executed, is abroad, in the hands of a *bona fide* holder, the Court will presume that it has been issued by the bank, and will hold them to pay it. Stealing or embezzling from a bank its own notes, duly executed and kept as cash to be paid out, whenever the bank has occasion to make payment, has the same injurious consequences of defrauding the bank as the taking of the bills of other banks held by it; and the impossibility of identifying such notes, when out, as notes thus stolen, leads practically to the same result. Where the question is, of an intent to defraud the bank itself, and also to defraud other persons, stealing from a bank its own notes is to be considered an offence of the same character as that of stealing the

notes of other banks. We do not perceive, therefore, that any distinction can be made between the $16,000 and the $9,000. And the Court are of opinion that as the bills in question were used and treated as money, and are now claimed to be held by the defendants as their own cash, the case comes within the general rule, that when bank bills are delivered as money and received as money, they may be considered as money for the purpose of remedy, and that averments of money had and received, money laid out and expended, may be sustained by proving such payment in bank bills, in the same manner as if paid in specie. Where money in bills was entrusted to a carrier, who lost it at play, it was held that the owner might recover the amount of the winner, in an action for money had and received. *Mason* vs. *Waite*, 17 Mass. 560; *Cummings* vs. *Noyes*, 10 Mass. 433; *Whitwell* vs. *Vincent*, 4 Pick. 449.

It is a well-settled maxim, that where chattels have been taken without title, and converted so that the owner might maintain trover if money had been received for them, he may waive the tort, and maintain assumpsit for the money. It seems to follow, therefore, that when the thing taken without title and converted, is itself an article which is ordinarily regarded as money, this action will lie.

It is, therefore, we think, to be considered in the same light as if by the same means they had obtained the money from the Atlantic Bank and transferred it to the Merchants, in bags of current specie.

But, further, on a slight re-consideration of the evidence, it seems to us that these views are rendered entirely unnecessary by the fact that before either bank had notice of the fraud by which these bills passed from the possession of the one to the other, the Merchants Bank, by its authorized officers, presented all the bills, as well the $16,000 of Atlantic bills as the $9,000 of others, to the Atlantic, and received payment for them. It follows, therefore, that whether the defendant bank received these bills rightfully or wrongfully, with or without valid title, they presented them to the plaintiff bank, and received of them the full amount in cash, so that if defendants are responsible in any form, it is strictly money had and received.

We have said that this money came into the possession and under the control of the Merchants Bank without any consideration passing from them, unless, as it is argued on the part of the defendants,

it was received in payment of a debt due them from Hooper. The argument is this: that Hooper, being under a defalcation to a large amount, which he had kept concealed, obtained the money from the Atlantic Bank and placed it in the Merchants Bank, by way of payment of such balance, and that it is immaterial to the bank how he acquired the money to pay them with, even if by fraud, if the bank did not know or participate in it. But if the law were so, this argument, in our opinion, cannot be sustained by the facts.

Whether the transfer of a sum of money, from one party to another, operates as a payment of an existing debt or duty, depends upon intention, and the intention of both parties. Such intention may often be implied from their relations and other circumstances. But it must exist. The bank could have no such intention, because if there was any defalcation, it was not known to it, and any intent to receive this money in payment of such defalcation is negatived.

There was no payment in fact, no delivery of money, actual or constructive, from the hand or power of the one to that of the other. Hooper, by clandestinely placing it with other funds of the bank in his possession, for the purpose of deceiving the bank, did not part with the control over it—it is still in his own power. Passing it to the committee, for the special purpose of being counted as their own, not as his, inducing them by fraud to believe that it was their own, and thereby precluding them from any inference or suspicion that it was his, was no act of transfer from Hooper, and could be accompanied by no intent to receive it as payment. Hooper's presenting that sum of money to the committee for that purpose was a significant declaration, on his part, that it was all money, which, as their officer and agent, he had received as their due in the regular course of their business; and although this was a gross falsehood, it shows the state of mind in which their officers received and examined his money and returned it, and precludes the idea that they received it in payment.

But in truth it was not the intention of Hooper to transfer the money to the bank for their own use, in satisfaction and discharge of the sum due them in consequence of his prior defalcations. It was intended to deceive them by exhibiting these bills, of which he himself was the keeper, and it was with the expectation and intent,

as soon as that object was accomplished, to deliver them back. Such a transaction could no more cancel and pay a debt than the exhibition of the same amount in counterfeit bills. If it was a payment, it discharged Hooper and his sureties from all liability for such defalcation, which, as it seems to us, cannot be pretended.

Had this money been found in the custody of Hooper, on examining his cash after his death, and nothing had been shown as to the mode in which it had been acquired, it might have been presumed that it was received by Hooper, in his official capacity, for a valuable consideration, in the due and ordinary course of business, in which case it might well have been presumed to be the property of the bank. Such possession, under such circumstances, might have been a *prima facie* title. But here there is no room for these presumptions. The proof is, that it did not come into the possession of Hooper in his official capacity, in the ordinary course of business, but was procured and placed there by his fraud.

If the act of the President and Fay, in examination of the money, is relied on as an admission on the part of the bank that Hooper had accounted for all the cash entrusted to him, the answer is, that certificate was obtained by fraud, and cannot affect the bank; and, further, that that examination was made, *alio intuitu*, it was not an accounting, it was simply an examination, and the whole, when examined and certified, was redelivered to Hooper, and remained in his custody till next day. In consequence of his suspicious conduct that morning, and his almost immediate death by suicide, other officers of the bank were put into the possession of the bills thus left by him.

The argument is, that by the production of the money to the committee, as and for his balance, and by the certificate of the committee, the property and right to the money is vested in the bank. But the answer is that it was not produced as and for his balance; neither party had any such relation in view.

If the defalcation of Hooper, which was then not known to the bank, but which is now known to have then existed, was not discharged by the production and exhibition to the committee of these bills, then no consideration passed from the defendants to Hooper, or any one else, as the price of those bills, and the defendants acquired their possession of them without consideration.

There is, however, another aspect in which the case may be considered, not essentially varying from the foregoing, but which may bring into view another legal element, that of knowledge of the fraud.

Undoubtedly the law intends, for wise considerations, to give the highest degree of credit to negotiable security, payable on time not yet expired, taken for valuable consideration, in the usual course of business, without notice of any antecedent fraud or want of title which would vitiate them, the reasons for which are very strong and quite satisfactory. *Wheeler* vs. *Guild*, 20 Pick. 545.

The credit given to bank bills in ordinary circulation is still higher, and the actual possession will be accompanied by a presumption of good title. The presumption, perhaps, is not so strong when bank notes are collected in large sums, and in the dealings of banks in them. Still, the presumption in either case is one of fact, and may be rebutted by evidence. And it will be rebutted in a case wherein the owner of bank bills proves that certain bills owned by him have been obtained from him by theft or fraud, and have passed from the fraudulent possessor to the defendant with knowledge of the fraud, and if they have passed through the hands of several persons, each having knowledge of such fraud, the holder, with the full benefit of the presumption of fact, that he has a good title, cannot hold it against one who can prove a prior good title, not rightfully transferred to any one, though without such notice he would have held it. For the application of this principle, actual notice is not necessary; constructive notice is sufficient. In the present case, there is not the slightest ground to suspect that the president, or any officer or director of the defendant bank, had any actual notice of the fraud by which Hooper obtained these bills from the Atlantic Bank, or that he obtained them at all. They had no knowledge of his defalcation till after his death, when they obtained a knowledge of the facts from Peabody and Ward.

Had they constructive notice? A bank is a corporation which can only act by agents; all its transactions in buying or selling, borrowing and lending, every act by which it can convey property or acquire it, must be done by agents. When any one of these transactions is of such a character that false representations, practice of fraud, or knowledge of fraud practised by another would

avoid the transaction, if done by an individual, it will equally affect a corporation, if done or had by the agent, in the same transaction for a corporation. Suppose a corporation have occasion to obtain insurance, and the agent who negotiates it makes false representations, which would render the policy void, if made for himself, it will render it void as a contract with the corporation, his principal. They will be affected with constructive notice. So, if a bank should have occasion to buy a horse for its messenger, and authorize him to buy one, and the agent should find one to his liking, and in negotiating about the purchase, should be informed that another man claimed that the horse had been obtained from him by fraudulent representations, it would be constructive notice of such claim to the bank.

In the present case, treating these notes obtained from the plaintiffs, in the most favorable view, either as bank bills, or negotiable securities, not discredited, or as specific property, the Court are of opinion that the only title acquired in them being through the agency of Hooper, his knowledge of the fraudulent title, under which he acquired and held them, was constructively the defendants' knowledge, and they cannot hold them against the true owners.

Here the first step as an official act of Hooper, the paying officer of the bank, was certifying that Peabody's check was good. It has been held that a bank teller has no power to bind the bank by such a certificate, even when the fact may be true when the check is presented, so that if not then paid, and other checks come in and the fund is paid out on them, the holder of such check has no remedy against the bank. *Mussey* vs. *Eagle Bank*, 9 Met. 306.

But, in the present case, it was a formal assertion, under his official signature, to a stupendous falsehood. This was done to enable his guilty associates to make use of what appeared to them perhaps to be the credit of the bank. Possibly Ward believed that this was a good security, by means of which he could realize the money from the Merchants Bank, and replace that of which he was defrauding his employers. At all events, we cannot say that without the intervention of this official act the fraudulent teller could have obtained the money he did. It was solely through the agency of Hooper that the defendants acquired any title to the bills, or any possession of them. The whole transaction, his falsehood to the

officers in saying that he told nobody that the money was to be counted that day, after he had notice from the president, when the evidence shows that this guilty machinery was all put in motion by notice to his guilty associates,—all these circumstances show how deeply conscious Hooper was of a guilty purpose. If notice to the agent was constructive notice to the bank, then the bank took these securities under an invalid title, which cannot prevail.

Some cases were cited to show that where an agent has become indebted to his principal, and pays the balance in current money, the principal can hold the money, although obtained by fraud. This may well be conceded to be good law; when the money obtained by fraud is not obtained by the exercise of such agency, the agent makes no contract in behalf of his principals, and they take nothing and claim nothing through his fraud.

It was claimed by the defendants that the plaintiffs had waived their right to proceed against the defendants, and had affirmed the doings of Ward in taking and claiming payment of the check. But there is nothing in the evidence to warrant this conclusion. No notice was had of the fraud until after the $25,000 in bills had been sent from the Merchants Bank to the Atlantic Bank, and paid by the latter. That is, they were received and credited to the Merchants Bank, but according to custom no settlement was made. Before 12 o'clock, but after Hooper's death, Ward made out another list, including the $25,000 check, with a few thousand dollars in bills to pay the balance due the Merchants Bank. It came back by the messenger, rejecting the check, by which their balance of $25,000 still remained due, which the check if good would have cancelled. Then the president told Ward to give them specie credit instead of the check. The specie credit was not given in satisfaction of the check, but of a general balance due from the Atlantic to the Merchants'. This was no confirmation of the act of Ward in taking this check.

So of the presentation of the check for payment; it was handed to them by Ward as a valid security for what it purported to be, a check by Peabody on the Merchants Bank. The only proper course for them was to present it, and leave it for the defendants to determine whether they would pay it or not, and the protest was of no

other effect than to get evidence of the presentment of the check for payment, and the refusal of the defendant bank to pay it.

If the plaintiffs had acquired a right of action, there was no waiver in not bringing it immediately. Nothing done or foreborne by them was the cause of any loss or inconvenience to the defendants, and no act is shown waiving any right.

A case was cited after the argument, which, in its facts, bears such a resemblance to the present, that it seems to deserve a separate consideration, though, upon a careful examination, it appears to us to have been decided upon a principle not inconsistent with the one hereby adopted. *Ingraham* vs. *Maine Bank*, 13 Mass. 208.

In order to compare the two cases, it is necessary to consider who were the parties, and what was the question in the case cited. It was a question, whether the sureties for the cashier's good behavior, on a bond given on June 1, were liable for the delinquency complained of. The cashier was delinquent before June 1, and so continued to October, when an examination of his cash was made by the directors. To meet this, the cashier officially drew checks on other banks, received the money, and placed it with his own, but did not credit those other banks with the amount; his cash therefore appeared right. After the examination, he paid those other banks out of the funds of his own bank, so that the transaction did not appear on the books of his own bank, and his deficit, in fact, stood as it did before June 1, when the bond was given. The question was, whether, at the time of the removal of the cashier, soon after this last transaction, the deficit then existing was chargeable to the obligors of the bond given June 1?

There the money was borrowed of other banks by the cashier, in his official capacity and under his general authority, to bind his bank by drafts, and it was responsible to those other banks, although in the particular case, without any special authority or any exigency of the bank requiring it. This might have been an act of misconduct on his part, though it would not impair the right of the banks with whom he dealt, unless his unlawful purpose was known to them, which is not suggested. The money thus raised by their cashier on their credit, and mingled with their cash, was their property in all respects; nobody could claim it by any prior

title. The cashier's delinquency on that occasion consisted not in drawing the money, but in failing to credit it to the bank from which it was drawn, in order to deceive and mislead his employers.

Not having treated the banks of which he borrowed the money as creditors of his bank, he regarded the drafts practically as a personal loan to himself. When, therefore, he afterwards took the funds of his bank, and, to pay these drafts, it was done to carry out his fraud, to cancel his own debt, it was an unlawful embezzlement, of the character of larceny practised then, and a violation of his duty, amounting to a breach of the bond given June 1, so that the sureties on that bond were liable.

The opinion of the Court is very short, and does not fully express the grounds on which the judgment was rendered. The Court say, that though a deficit existed before the execution of this bond, and might have been covered by an antecedent bond, yet the taking of money afterwards to pay what he had thus (clandestinely) borrowed, was also a breach of the condition of this bond. "For the money, when placed in the vaults, became the property of the defendants" (the bank;) "and the transaction cannot be distinguished from an actual payment from his own funds to supply the defalcation, and a removal afterwards of the funds of the bank without the consent of the defendants." It is upon this last paragraph of the judgment that we think it necessary to remark.

In that case, undoubtedly, the money was the property of the bank, raised on their credit and placed with their funds. Besides that, as against the cashier, and those responsible for him, it was so far its property, that he would be estopped to deny it, and as against them it would be the property of the bank. To take an illustration from the present case. Suppose Hooper had had a secret hoard of his own outside the bank, and had procured from that $25,000, and placed it with his own for the examination of the committee, and they for some cause had, after counting it, withheld it, and not returned it to him, he could not have reclaimed it, as against him the property would be held theirs. But if, instead of such hoard of his own, he had fraudulently obtained it of another person, it would not be theirs, in its true and proper sense, that is, by a good and indefeasable title. But what is more decisive of the

correctness of the judgment in that case is this: The Court intimate that the facts taken together would perhaps prove a breach of both bonds, that anterior and that subsequent to 1st June, and probably they would. In that case the breach, by the prior misconduct, would have caused no damage to the obligees, because by some means, right or wrong, the loss occasioned by it had been repaired, and the judgment must have been for nominal damages only. Whereas, the breach by the subsequent misconduct, in wrongfully withdrawing the funds of the bank, was the very breach by means of which the obligees sustained their loss; and it was no answer by the obligors on that bond that the misconduct of the cashier originated prior to the bond given by them.

In the last clause, the Court say, "the transaction cannot be distinguished from an actual payment from his own funds."

This shows how necessary and important it is, in construing judicial decisions, to consider them as made with a tacit reference to the subject-matter, and the facts and circumstances of each case, and with the limitations and qualifications implied thereby. The Court say, the money when placed in the vaults by the cashier became the property of the bank. True, it did in that case, and would in all cases as against the cashier who had so placed it for such purpose; but they do not mean to say his placing it there, however acquired, would make it absolutely theirs to all purposes; such limitation was not expressed, because not necessary to that case. So "the transaction could not be distinguished," &c.—it was true as to that case, and with a view to the judgment to be then rendered. The deficit under the first bond had been satisfied by funds produced by the cashier, and which the bank was not answerable to any one else for, no actual damage had been sustained by the bank, and if it could have a judgment, it would be for nominal damages, and would afford no defence or relief to the obligors on the subsequent bond. For any purposes of that inquiry the transaction was not distinguishable; but we are not, therefore, to infer that the bank can hold it against the true owner, merely because the cashier paid it in, if he procured it by such means, that the true owner might recover it back. The decision, therefore, is not repugnant to the one we now make. Plaintiffs entitled to recover.